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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

JOSE ARANDA, et al., *Petitioners,*

v.

J. B. VAN SICKLE, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VILMA S. MARTINEZ
MORRIS J. BALLER
LINDA HANTEN
Mexican American Legal Defense and Educational Fund
28 Geary Street, 6th Floor
San Francisco, CA 94108

JOAQUIN G. AVILA
Mexican American Legal Defense and Educational Fund
517 Petroleum Commerce Building
201 N. St. Mary's Street
San Antonio, TX 78205

Attorneys for Petitioners

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1979

No. 79 -

JOSE ARANDA, et al.,

Petitioners,

vs.

J.B. VAN SICKLE, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, Jose Aranda, et al.[1], respectfully pray that this Court grant a writ of certiorari to review the judgment entered herein, in favor of Respondents,[2] by the United States Court of Appeals for the Ninth Circuit.

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[1]Petitioners are Jose Aranda, Hector Barragan, Ruth Estrada, Jess Margarito, Barbara Parra, and Louis Vargas.

[2]Respondents are J.B. Van Sickle, Philip Johnson, Paul Macy, Quentin Johnson, Perry Harris and Helen Ramsey.

DECISIONS BELOW

The Memorandum Opinion of the United States District Court for the Central District of California, entered July 16, 1976, is reported at 455 F. Supp. 625 and is reprinted herein at App. p. 1A. Further findings of fact, conclusions of law and a judgment by the District Court, entered by the District Court on June 9, 1979 and June 10, 1979, are unreported, and are reprinted at App. pp. 15A-20A. The opinion of the Court of Appeals for the Ninth Circuit, filed July 12, 1979, affirming the District Court's decision, is reported at 600 F.2d 1267 and is reprinted at App. p. 21A. The order of the Court of Appeals denying rehearing, filed September 17, 1979, is reprinted at App. p. 55A.

JURISDICTION

The judgment of the Court of Appeals was entered July 12, 1979 (App. p. 21A). The Order of the Court of Appeals denying rehearing was entered September 17, 1979 (App. p. 55A). On December 5, 1979, Mr. Justice Rehnquist granted Petitioners an extension of time in which to file this Petition to February 1, 1980. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Was it error to grant summary judgment in an at-large election case under the Fourteenth Amendment, where the factual record contains numerous indications of "dilution" of a racial minority's voting strength?

2. Does the Fifteenth Amendment prohibit practices which deny or abridge the right to vote of members of a racial minority, even if those practices are not shown to be motivated by an invidious purpose?

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deny to any person within its jurisdiction the equal protection of the laws.

Section 1 of the Fifteenth Amendment provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

STATEMENT OF THE CASE

In this action Petitioners, who are Mexican American voters, challenge Respondents' maintenance of an at-large election system for the City Council of San Fernando, California as violative of the Fourteenth and Fifteenth Amendments. Petitioners' claim is founded on the "dilution" principle articulated in *White v. Regester*, 412 U.S. 755 (1973), and presented by two cases now pending before the Court, *City of Mobile v. Bolden*, O.T. 1977 No. 77-1844, and *Williams v. Brown*, O.T. 1978 No. 78-357.

Petitioners are six Mexican American residents and registered voters of the City of San Fernando, California. Respondents are the Mayor of San Fernando, four other members of the City Council, and the City Clerk. Petitioners filed their complaint on March 1, 1974 and an amended complaint on March 15, 1974. The District Court's jurisdiction was invoked pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4). Following extensive discovery and several procedural orders, the District Court entertained a motion by Respondents for summary judgment. Respondents' summary judgment pleadings consisted of an extremely general discussion of legal standards plus two pages of conclusory assertions of ultimate fact.[3]

[3]Record, pp. 1134-1142.

Respondents' entire showing of facts consisted of an analysis of deposition evidence relating to the named plaintiffs (Petitioners here) individually.[4] In response to Respondents' motion, Petitioners filed a book-length pleading consisting of affidavits and authenticated records and documents, almost entirely factual in content.[5]

The facts established by discovery and the public record herein, and placed before the District Court by Petitioners, are summarized in the opinion of the Ninth Circuit by Judge Barnes, see 600 F.2d at 1268-70, App. pp. 22A-28A, and elaborated in the concurring opinion of Judge Kennedy, see 600 F.2d at 1276-79, App. pp. 43A-51A. In brief, Petitioners established the following salient facts, without specific refutation by Respondents:

[4]Record, pp. 1143-51.

[5]Included in Petitioners' "Statement of Genuine Issues as Required by Local Rule 3(g)(2)" (Record p. 1270) were some complex and lengthy factual exhibits, charts, and documents. Petitioners also filed several other affidavits, including one by a qualified expert (Record p. 1163) who found indications of dilution in the record.

1. Although Mexican Americans account for nearly half of the City's population, only three Mexican Americans have ever been elected to the five-member San Fernando City Council in over 60 years of the City's history.

2. The City of San Fernando consists of two largely separate, racially identifiable areas. Eighty percent of the Mexican American population lives in a "barrio" located across the railroad tracks. The barrio's population is poor, underemployed, ill-educated and crowded in comparison to more affluent Anglo sections. For at least ten years, no member of the City Council has been elected from or resided in the barrio area.[6]

3. Analysis of election returns indicates racially polarized bloc voting in City Council elections. Mexican American candidates in two hotly contested elections (those of 1964 and 1972) attracted substantial support from precincts in the barrio, but won few votes in the Anglo area.

4. Mexican Americans were employed in a disproportinately small number of city jobs, and at lower job levels than their Anglo counterparts. Mexican Americans were also either absent, or

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[6]The record shows the residence of council members only for the past ten years (S.J. Ex. 25, 26). There is no evidence that any council member was ever elected from the barrio at any previous time.

severely underrepresented, in the membership lists for commissions and boards appointed by the Council or Mayor.

5. There was unrebutted evidence that Mexican Americans were subtly discouraged from participating fully in voting (as by location of polling places in Anglo homes and, before 1975, English-only election materials) and that racially tainted campaign tactics were used by Anglo interests in at least two separate elections (those of 1954 and 1972).

6. The City proffered no substnatial reason for maintaining its at-large election policy. It suggested only that in a district election scheme, some districts (presumably in minority areas) would be unable to generate "meaningful" candidate choice.

The District Court granted Respondents' motion for summary judgment. While purporting to accept Petitioners' factual submissions as true (App. p. 20A) the District Court in fact systematically disbelieved and found against Petitioners' proffered facts, in many instances without record evidence to contradict Petitioners' submissions.[7] In addition to rejecting Petitioners' version of the facts, the District Court drew all inferences from the facts to favor Respondents (the parties moving for summary judgment).

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[7]455 F. Supp. at 626-29, App. pp. 16A-19A.

The Court of Appeals affirmed. Although the Court adopted the District Court's opinion, the appellate court handled the factual issues somewhat differently. The panel's majority opinion did in fact accept Petitioners' specifical factual submissions as true (600 F.2d at 1268-70, App. pp. 34A, 22A-28A). It nevertheless approved summary judgment for Respondents on two grounds: first, Petitioners failed to show "that they have been denied access to the political process (i.e., to register, to vote, to be candidates for public office, to campaign for office, to participate in the selecting of candidates, or to hold office" (600 F.2d at 1271, App. p. 29A); and second, Petitioners did not prove "that the San Fernando elections for City Council were 'conceived or operated as purposeful devices to further racial [or economic] discrimination' " (*id.*).

Judge Kennedy's concurring opinion took a more nuanced approach. It recognized both that some of Petitioners' evidence would support a finding of intentional official discrimination against Mexican Americans in several areas other than voting and elections, and that from the same evidence a trier of fact could infer some degree of denial of access to the political process (600 F.2d at 1277-79, App. pp. 45A-53A). Nevertheless, Judge Kennedy concluded,

the weight of that evidence was not sufficient to support a finding of invidious intent with respect to the political process itself, nor to justify the "extreme" political restructuring of the remedy sought by Petitioners--the substitution of by-district for at-large elections (*id.*).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION CONFLICTS WITH A LINE OF EQUAL PROTECTION DECISIONS BY THE FIFTH CIRCUIT WHICH DEFINE THE PROPER WEIGHING OF EVIDENCE SHOWING DILUTION OF MINORITY VOTING STRENGTH.

In a long line of decisions growing out of this Court's decisions in *White v. Regester*, 412 U.S. 755 (1972), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court of Appeals for the Fifth Circuit has established detailed standards and procedures for adjudication of claims by minority voters that at-large elections dilute their vote in violation of the Fourteenth Amendment's Equal Protection Clause. The seminal case of this line, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub. nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), has been reaffirmed and applied in at

least a dozen other decisions of that Court.[8] The Ninth Circuit's decision herein conflicts with this line of cases in at least three important respects, specified below. This Court should grant the Writ of Certiorari to resolve the conflict of circuits by correcting the Ninth Circuit's deviation from the teachings of *Zimmer* and its prog-

[8] *See, e.g., Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973); *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976); *Nevett v. Sides* (I), 533 F.2d 1361 (5th Cir. 1976); *David v. Garrison*, 533 F.2d 923 (5th Cir. 1977); *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert denied* 434 U.S. 968 (1977); *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Nevett v. Sides* (II), 571 F.2d 208 (5th Cir. 1978), *pet. for cert. filed* 47 LW 3247; *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *prob. jur. noted* 58 L.Ed.2d 106 (1978); *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978); *Thomasville Branch, NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978); *Corder v. Kirksey*, 585 F.2d 708 (5th Cir. 1978); *Cross v. Baxter*, 604 F.2d 875 (5th Cir. 1979); *McIntosh County NAACP v. City of Darien*, 605 F.2d 753 (5th Cir. 1979); *Lipscomb v. Wise*, 551 F.2d 1043 (5th Cir. 1977), *rev'd on other grounds* 437 U.S. 535 (1978).

The Seventh Circuit's sole decision in this area, *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975), echoes the Fifth Circuit's holdings. *Kendrick*'s reversal of a trial court's dismissal of an at-large challenge also conflicts in principle with the summary judgment granted here.

eny.[9]

The Court of Appeals affirmed a grant of summary judgment for Respondents. With the case in this posture, the Ninth Circuit must have determined that Petitioners' evidence could not support an inference of denial of minority political access.

Petitioners introduced voluminous, specific, and highly pertinent evidence tending to show that Mexican Americans are denied equal access to the political process in San Fernando. That evidence was consistent with, and indeed modeled on, the types of facts which under the *Zimmer* line of Fifth Circuit authorities would support or compel an inference that minority voters were denied equal political access. The District Court systematically discredited all these showings, in conclusory terms,[10] and granted summary judgment against

[9] As interpreted in *Nevett v. Sides* (II), *supra*, the *Zimmer* analysis requires proof of invidious racial intent as an element of the Fourteenth Amendment claim. This intent may be shown by evidence concerning the factors articulated in *Zimmer*. This Petition therefore presents no issue with respect to the intent requirement under the Fourteenth Amendment.

[10] For example, the District Court found, based on sheer speculation, that low Mexican American regis-

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against petitioners.[11] The Court of Appeals adopted this judgment in affirming. This Court's grant of certiorari and resolution of the conflict of circuits will settle important questions with respect to the evidence sufficient to support an inference of discrimination in at-large challenges.

1. The Ninth Circuit's decision presumes that denial of access to the political process may be shown only by direct evidence of exclusion from some aspect of the electoral system (see 600 F.2d at 1271, App. pp. 29A-31A).[12] The court found dispositive its perception that there was

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tration figures were due to political apathy (455 F. Supp. at 629; App. pp. 8A, 14A, 19A). There is no evidence to this effect anywhere in the record; on the contrary Petitioners' evidence shows numerous other plausible reasons for low voter participation. *Cf.* pp. 17-18, *infra.*

[11]The District Court's handling of the evidence was contrary to the most basic standards of summary adjudication, which require that substantially disputed facts be viewed in the light most favorable to the party opposing summary judgment and that evidence to counter a specific factual showing must also be specific and on-point. *Adickes v. Kress and Company*, 398 U.S. 157, 161 (1970); Fed. R. Civ. P. 56(e).

[12]"[*I.*]*e.*, to register, to vote, to be candidates for public office, to campaign for office, to participate in the selecting of candidates, or to hold office."

> no protracted history of racial discrimination affecting or touching a minority's ability to participate in the electoral process (such as segregated schools, tests to quality voters, or refusal to register Mexican Americans) which are the background of many cases arising out of the Fifth Circuit.

600 F.2d at 1271, App. p. 29A. These conclusory statements overlook undisputed facts which the more sensitive inquiry and the more detailed fact-finding required by the Fifth Circuit would have given importance--for example, that elections and election materials were in English only until the bilingual election provisions of the Voting Rights Act Amendments of 1975[13] took effect; that the location of polling places in Anglo homes would--given the segregated society of San Fernando--tend to discourage Mexican Americans from voting[14]; and that only a small percentage of election judges and inspectors were Mexican Americans.[15]

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[13]See 42 U.S.C. § 1973 aa-1a (1975); *Graves v. Barnes*, 343 F. Supp. 704, 730 (W.D. Tex. 1972), *aff'd in pert. part sub. nom. White v. Regester*, 412 U.S. 755 (1973).

[14]*Cf. Graves v. Barnes, supra,* 343 F. Supp. at 730-31.

[15]Figures for the 1964, [continued next page]

But more fundamentally, the court below ignored the Fifth Circuit's well-established teaching that inquiry into denial of access cannot be contained within the borders of the political system. Under *Zimmer* and its progeny, the absence of minority elected officials together with evidence showing discrimination or inequality in the general life of the community, outside voting or elections, strongly supports an inference of diminishment of voting rights.

> A denial of access may take any of several forms, ranging from such direct governmentally-sanctioned exclusions as the poll tax or the white primary . . . to the less concrete but no less effective barriers to participation such as cultural and language differences between the majority and minority, or a disproportion between the levels of education, income, employment, and living conditions of the majority and minority . . . . [T]he inquiry into equality of access should not come to a halt simply because the evidence shows that there are no longer any barriers imposed by law to minority access. Non-legal barriers may also preclude full black participation

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1970 and 1972 elections show as few as 6%-13% Spanish-surnamed officials. Record, p. 1270, S.J. Ex. 48, 49, 50.

> in the political process . . . [such as] evidence that black candidates encountered difficulties in campaigning in white neighborhoods and evidence that housing conditions, employment rates, income, and educational levels are considerably less advantageous for . . . blacks than for . . . whites . . . [E]vidence of socioeconomic inequities gives rise to a presumption that the disadvantaged minority does not enjoy access to the political process on an equal basis with the majority.

Cross v. Baxter, 604 F.2d 875, 879-80 (5th Cir. 1979) (citations omitted). See also, *Zimmer v. McKeithen*, *supra*, 485 F.2d at 1305-06; *Kirksey v. Board of Supervisors of Hinds County*, *supra*; *Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975).[16]

[16]The Seventh Circuit wrote,

> Where, as here, no official distinctions have been drawn between voters, plaintiffs may still demonstrate that they have been disadvantaged by the system. The inquiry is not conducted in a vacuum, nor in the abstract. The total situation as it exists in the particular locality is considered and an actual impact on voters' rights must be demonstrated.

527 F.2d at 48.
[continued next page]

The Ninth Circuit's doctrinal blinders kept it from giving serious consideration to the range of evidence presented by Petitioners. Under standards developed by the Fifth Circuit, the court below erred in failing to conduct a broad inquiry and refusing to consider inferences bearing on political life from evidence outside the voting arena.

2. The Ninth Circuit also dismissed any inferences of minority vote dilution based on past discrimination which had been discontinued. In addition to emphasizing the absence of a "protracted history of racial discrimination" (600 F.2d at 1271, App. p. 30A), as noted above, the Court below found "no substantial [,] proof in the record of past discrimination, [and] no substantial proof of continuing discrimination" (600 F.2d at 1272, App. p. 33A). The court dismissed much of Petitioners' background evidence of past pervasive discrimination as "historical data [including] old newspaper articles with racist overtones, and deeds which contain racially restrictive covenants," 600 F.2d at 1268, App. pp. 22A-23A.

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The Seventh Circuit also noted, "the operation[s] of the political machinery in Cairo (some of which if isolated might appear neutral or equivocal), take on a new dimension viewed against such a pattern of discrimination," 527 F.2d at 49.

Under the Fifth Circuit precedents, absence of current discrimination does not negate the inference that past discrimination has the present effect of detracting from minority political access. The Fifth Circuit holds that when a history of past official discrimination is shown,

> the inference is strong that the disproportions in voter registration and elected officials are at least in part a result of past pervasive discrimination . . . . Once plaintiffs have demonstrated a history of pervasive discrimination and a present disproportion in voting registration and election of minority representatives, they have carried their burden of proving that the past discrimination has present effects.

Cross v. Baxter, supra, 604 F.2d at 881; *Zimmer v. McKeithen, supra,* 485 F.2d at 1305. With specific reference to the link between past general discrimination and present effects on minority voting, the Fifth Circuit has rejected the same conclusion reached by the Court below:

> The [district] court referred to post-1966 registration of black voters and concluded that any black not currently registered has failed to register because of lack of interest or apathy. This conclusion is not supported by sufficient

> evidence. It is not a matter for judicial notice.[13]

[13] Failure to register may be, for example, a residual effect of past non-access, or of disproportionate education, employment, income level or living conditions. Or it may be in whole or in part attributable to bloc voting by the white majority, *i.e.*, a black may think it futile to register.

Kirksey v. Board of Supervisors of Hinds County, *supra*, 554 F.2d at 145.

The Ninth Circuit's unwillingness to consider the present effects of historical discrimination practices is at odds with the Fifth Circuit's correct perception that in some cases old wrongs may go far toward explaining present inequities.

3. The Court below gave little weight to Petitioners' strong evidence showing that San Fernando's elected officials were non-responsive to the needs of Mexican Americans. The majority opinion did not mention Petitioners' many-faceted showing of non-responsiveness. Judge Kennedy's concurring opinion discusses but ultimately rejects that showing, which it nonetheless characterizes as "substantial," 600 F.2d at 1278, App. p. 47A. Judge Kennedy agreed that the trial court had erred in summarily concluding that the absence of Mexican

Americans from City commissions[17] was the product of "low civic awareness . . . not the result of racial discrimination," *id.* However, Judge Kennedy explained the low level of Mexican American employment in City jobs[18] by inferring that it was possibly a product of poor education, and that given the choice of possible inferences it was not error to deny the requested relief (which, as previously noted, he considered extreme, see p. 9, *supra*) on this ground, 600 F.2d at 1278, App. pp. 48A-50A.

The majority opinion completely misses, and the concurring opinion seriously underestimates, the importance of Petitioners' non-responsiveness evidence. The Fifth Circuit has noted that,

> Perhaps the most sensitive and difficult inquiry a district court must consider under *Zimmer* is whether the elected officials in question are responsive to minority needs. The evidence relevant to this question is likely to be hotly disputed and wide-ranging.

[17] Undisputed evidence showed that over the last ten years, six commissions had no Chicano members, and the other six had only 6%-18% Spanish-surnamed members. Record, p. 1270, S.J. Ex. 27, 28.

[18] The City's workforce was over 70% Anglo, with the few Chicanos concentrated in the lowest-paid jobs. Record, p. 1270, S.J. Ex. 51, 52.

McIntosh County NAACP v. City of Darien, 605 F.2d 753, 759 (5th Cir. 1979). For this reason, the Court in *Darien* reversed a lower court ruling that had not carefully considered a racially unrepresentative pattern of appointments to city commissions and to city jobs, as well as the inferences of discrimination to be drawn therefrom, *id.* at 760. The Fifth Circuit earlier explained the close link between evidence of non-responsive official behavior and the inference of invidious intent in cases where, as in the case at bar, racially identifiable voting patterns are present:

> Polarized or bloc voting, although in itself constitutionally unobjectionable, allows representatives to ignore minority interests without fear of reprisal at the polls. When bloc voting has been demonstrated, a showing under *Zimmer* that the governing body is unresponsive to minority needs is strongly corroborative of an intentional exploitation of the electorate's bias.

Nevett v. Sides (II), *supra,* 571 F.2d at 223 (footnotes omitted).

The Ninth Circuit treated evidence that elected officials were non-responsive to Mexican Americans as of marginal importance to the ultimate issue of dilution. This failure to accord proof of non-responsiveness its due weight is a sharp break from

principles long since settled in the Fifth Circuit.

4. We do not urge, and this Court need not find, that Patitioners established a conclusive case of minority vote dilution by their evidence in opposition to the summary judgment motion. Our submission is that Petitioners' evidence will support inferences of unlawful dilution, and therefore the grant of summary judgment below was improper. The Court of Appeals improperly accepted the trial court's hasty and conclusory summary of its evaluation of disputed evidence. The Fifth Circuit, in similar at-large election cases, has repeatedly vacated judgments based on far more detailed fact-finding than occurred in this case, on the grounds that the fact-finding was insufficiently specific to comply with Rule 52(a), Fed. R. Civ. P. See, *e.g., David v. Garrison, supra,* 553 F.2d at 929;[19] *Hendrix v. Joseph, supra,* 559 F.2d at 1268; *Blacks United for Lasting Leadership v. City of Shreveport, supra,* 571 F.2d at 251; *Nevett v. Sides* (I), *supra,* 533 F.2d at 1365; *McIntosh County NAACP v. City of Darien, supra,* 605 F.2d at 757. In *Cross Baxter, supra,* the Court underscored the need for detailed Rule 52(a) findings, "Because the resolution

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[19] In *David* the Court held, "conclusory findings

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of a voting dilution claim requires close analysis of unusually complex factual patterns . . . and because the decision of such a case has the potential for serious interference with state functions," 604 F.2d at 879. The Court of Appeals followed a markedly different standard in affirming the summary judgment below.

If the Ninth Circuit's standard remains uncorrected, voting rights plaintiffs seeking to challenge at-large election shcemes in that Circuit will be precluded from trial on the same claims, similarly supported in the evidence, that have won judgments in the Fifth Circuit. This Court should therefore grant the Writ of Certiorari to review the Ninth Circuit's rejection of the sufficiency of the claims and showings accepted by the Fifth Circuit as the basis for at-large dilution challenges.

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as to each of the *Zimmer* criteria are no more helpful than an overall conclusory finding of dilution. The factual predicates for such conclusions must be stated by the trial court," 533 F.2d at 929.

II. THIS CASE PRESENTS THE IMPORTANT UNRESOLVED QUESTION OF WHETHER THE FIFTEENTH AMENDMENT PROHIBITS PRACTICES WHICH DENY OR ABRIDGE THE RIGHT TO VOTE OF MINORITY PERSONS EVEN IF THOSE PRACTICES ARE NOT SHOWN INTENTIONALLY DISCRIMINATORY.

The Court of Appeals presumed that the Fifteenth Amendment, like the Fourteenth Amendment's Equal Protection Clause, requires the plaintiff in an at-large dilution case to prove the existence of invidious intent to deny the vote to minority persons (600 F.2d at 1270, 1275; App. pp. 30A, 39A).[20] The similarity or difference between the two Amendments with respect to the "intent" standard in voting rights cases is an important question as yet unresolved by this court.[21] The Ninth Circuit presumed an equivalence of standards which is, we believe, unfounded and erroneous. This Court should grant certiorari to resolve this important question by reversing the Court of Appeals.

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[20]The Fifth Circuit has so held, *Nevett v. Sides* (II), *supra*, 571 F.2d at 220-21, with Judge Wisdom dissenting, *id.* at 234-36. The Seventh Circuit has noted and reserved the issue presented here. *Kendrick v. Walder*, *supra*, 527 F.2d at 47 n. 5.

[21]The issue is, however, presented to the Court
[continued next page]

Petitioners raised their Fifteenth Amendment claim in both their original and amended complaints. The District Court noted this claim (455 F. Supp. at 625, App. p. 2A) and appeared to entertain the argument (which it rejected on the facts) that a non-invidious, facially neutral election plan could be constitutionally defective (455 F. Supp. at 626, App. pp. 3A, 13A). Petitioners maintained their Fifteenth Amendment claim before the Ninth Circuit.[22] It is properly before this Court.

By its terms, the Fifteenth Amendment is both broader and narrower than the Fourteenth. While the earlier Amendment prohibits invidious official action in all governmental activities, the scope of the Fifteenth is limited to voting. But in terms of the nature of the acts prohibited, the Fifteenth is more expansive. While the Equal Protection Clause takes aim at the quality of official action--that invidiousness which this Court in *Washington v. Davis*, 426 U.S. 229 (1976), equated with intent to discriminate--the Fifteenth Amendment's target is a result: that the right to vote "shall not be denied

[from previous page]
in *City of Mobile v. Bolden*, *supra*, and *Williams v. Brown*, *supra*.

[22]The Court's opinion noted the claim (600 F.2d
[continued next page]

or abridged."[23] The quality of the state action--or for that matter, any action including private action--is not the focus of these terms. Nothing in the language specifies or implies that the Amendment reaches only intentional discrimination.

Nothing in this Court's prior Fifteenth Amendment decisions limits the Amendment to prohibition of intentionally invidious denials of voting rights. While most of those cases presented blatantly and deliberately discriminatory designs on which the Court commented,[24] nowhere does the Court

[from previous page]
at 1270, App. p. 22A). While, as Judge Kennedy's opinion correctly notes (600 F.2d at 1275; App. p. 39A), Petitioners' briefs did not explicitly discuss the different standards related to showing "intent" under the two amendments (those briefs were filed before the Fifth Circuit's decision in *Nevett v. Sides*, *supra*, focused attention on the issue), Petitioners expressly raised their present theory at oral argument.

[23]The narrower focus of the Fifteenth Amendment on the "fundamental political right" of the franchise, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), obviates the difficulties of application to a wide range of governmental activities which in part led the Court to eschew an "effects" test for Fourteenth Amendment claims, see *Washington v. Davis*, *supra*, 426 U.S. 229, 248 (1976).

[24]See, *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. United States*, 238 U.S. 347 (1915).

specify that proof of such a design is an element of the Fifteenth Amendment claim. The holding of *Wright v. Rockefeller*, 376 U.S. 52 (1964), is not inconsistent with our position.[25]

On the contrary, several of the Court's Fifteenth Amendment decisions support our interpretation. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court struck down a voter registration law which operated to exclude black voters, without questioning the neutrality of the statute's terms or motivation, 307 U.S. at 274, 276. With the reminder that "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination," 207 U.S. at 275, the Court invalidated "onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race," *id.* In *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 461 (1953), the Court struck down two schemes which had the effect of segregating the only Texas Demo-

[25] In *Wright* all parties focused on the existence *vel non* of intentional racial gerrymandering as the central issue in the case; in ruling for defendants, the Court based its decision on a failure of proof without examining any alternative theory, 376 U.S. at 56.

cratic primary "that counts," even though in each case the only overtly discriminatory intent was that of private parties, while the evil of the state's facially neutral scheme was that it incorporated such a primary as part of its electoral system.

Our submission that the Fifteenth Amendment prohibits all practices which operate to "deny or abridge" the right to vote of racial minorities, whether or not intentionally, is consistent with the understanding of Congress which adopted the Amendments. The legislative history and supporters' remarks which demonstrate this Congressional understanding are set out in briefs filed before this Court in *City of Mobile v. Bolden, supra*, see Brief for Appellees, pp. 87-90, and Brief for United States, pp. 86-87.

Both courts below searched for a missing ingredient--intent--which is properly unnecessary. Their rulings that plaintiffs' case failed for lack of proof of designedly discriminatory barriers to equal voting rights were therefore made under an erroneous view of constitutional principles. Because the Court of Appeals decision raises and wrongly decides an important constitutional issue, this Court should grant the writ to review this question.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

DATED: Janaury 30, 1980.

Respectfully submitted,

VILMA S. MARTINEZ
MORRIS J. BALLER
LINDA HANTEN
Mexican American Legal Defense
and Educational Fund
San Francisco, California

JOAQUIN G. AVILA
Mexican American Legal Defense
and Educational Fund
San Antonio, Texas

Attorneys for Petitioners

APPENDIX

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSE ARANDA, RALPH ARRIOLA, HECTOR BARRAGAN, RUTH ESTRADA, JESS MARGARITO, SYLVESTER MORENO, BARBARA PARRA, and LOUIS VARGAS, Plaintiffs, v. J.B. VAN SICKLE, PHILLIP JOHNSON, PAUL MACY, QUENTIN JOHNSON, PERRY HARRIS, and HELEN RAMSEY, Defendants.	ENTERED JUL 16 1976 NO. CV 74-551-JWC MEMORANDUM OPINION

The plaintiffs are Mexican American residents of the City of San Fernando. They bring this action on behalf of themselves and all other Mexican American residents of that city. They seek declaratory and injunctive relief against the defendants who are members of the City Council of the City of San Fernando, claiming that the "at-large" election method utilized by that city in their municipal elections in selecting members to the Council is unconstitutional because it "arbitrarily and capriciously cancels, dilutes, and minimizes the force

and effect of the voting strength of plaintiffs and the classes which they represent and, consequently, violates plaintiffs' right to equal protection of the laws and their right to vote pursuant to the fourteenth, fifteenth, nineteenth and twenty-sixth amendments of the United States Constitution."

It is well established, indeed, the plaintiffs do not argue to the contrary that an "at-large" election method of selecting councilmen is not per se unconstitutional. At the same time, such a system of election may be implemented in such fashion as to invidiously cancel out or minimize the voting strength of racial groups. The fact, however, that the Mexican American voters have not had seats on the council in proportion to its voting potention, in and of itself, is not enough to establish racial group discrimination. As the Supreme Court said in *White v. Regester*, 412 U.S. 755 (1973):

> "The plaintiffs' burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question--that its members had

> less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S. 766.

The defendants contend that the voting scheme provides equal and open access to the voters of San Fernando to the political processes of the City and that the inquiry need go no further.

Although a system may be neutral on its face as, in my view, the San Fernando system is, it may, nevetheless, operate to dilute, minimize or cancel out minority voting strength in a manner and to an extent violative of constitutional guarantees. In determining whether it does or not, as the court said in *Kendrick v. Walder*, 527 F.2d 44:

> "The analysis . . . does not stop with a consideration of whether the one-man, one-vote ideal has been achieved, but reaches beyond methematical equality to see if the group in question can obtain effective representation within the electorial system as it operates. This is not to suggest

that the designation of seats for minority representatives in proportion to their voting strength is compelled (or even permitted) by the equal protection clause, but if, as a result of the method of apportionment, the group is disadvantaged in its use of the ballot, an equal protection claim may exist. *White v. Regester, supra; Whitcomb v. Chavis,* 403 U.S. 124 (1971); *Burns v. Richardson,* 384 U.S. 73 (1966); *Fortson v. Dorsey,* 379 U.S. 433 (1965)." 527 F.2d 48.

Plaintiffs contend that the voting scheme as implemented does in fact cancel, dilute and minimize the force and effect of the voting strength of the plaintiffs and the members of the class which they represent. In support of this contention, plaintiffs set forth several factual situations upon which they rely to support these conclusions, each of such factual situations will be discussed seriatim.

I. THE CITY'S HISTORY OF RACIAL DISCRIMINATION

Plaintiffs point out that almost since its inception, the City has been divided into separate communities, the Anglo community and the Mexican American community, a division which has been geographical and cultural. Racially restrictive covenants were utilized in deeds preventing non-whites from living in certain portions of the City until 1948 when the Supreme Court, in *Shelley v. Kramer,* 334 U.S. 1 (1948), declared such covenants unconstitutional. This has resulted in the creation of a Mexican section of the City which plaintiffs refer to as the "barrio." Plaintiffs also refer to a series of newspaper accounts appearing periodically from February 7, 1913 to June 1, 1923, which plaintiffs characterize as a portrayal of Mexicans in negative terms. From these facts, plaintiffs argue that the City is today racially polarized into the Anglo faction and the Mexican faction.

No one would deny that up until fairly recently, discriminatory practices were rampant not only in San Fernando but throughout the entire country. But it is equally apparent that certainly within the last twenty years the American people as a whole have developed a sensitiveness to the rights, privileges and opportunities of minorities. The practice of using discriminatory covenants in deeds

which was prevalent throughout the country many years ago was terminated in 1948, and the last newspaper article with racial overtones referred to by the plaintiffs was published in 1923. In my view, even though these facts be true, they do not in any way support the contention that the City today, is or has, at any time in the recent past, been racially polarized.

II. PRESENT INDICIA OF RACIAL POLARIZATION

Plaintiffs contend that the Mexican American community today is still concentrated in the "Mexican quarter" and suffers from poverty, lack of education, and jobs.

Although these facts may be true, these do not necessarily indicate that the City is racially polarized. There is no member of the Mexican American community who could not move and live any where in the City of San Fernando he wishes, porivded he could afford to do so. The reason the members of the community remain where they are is by choice or economic necessity. There is little doubt but that the barrio has many undesirable characteristics. Old, cheap houses in a densely populated area, lacking modern conveniences, housing people below the low poverty level, many unemployed, where education levels are low and whole household occupation is dense. Such conditions, assuming that they do in fact exist, are of course deplorable and it is incumbent upon a city government in the interest of humanity to do what it can to improve them. But these are social problems which, to a greater or lesser extent, face all communities and are problems which arise because local governments have not always been able to successfully accomodate the economically and educationally disadvantaged who constitute a portion of their citizenry. Insofar as the City of San Fernando is concerned there is nothing in the record to indicate that race plays any role in the problem. The underprivileged, be they white, brown or black, suffer the same unhappy fate, and the fact that there may be a concentration of underprivileged persons along racial lines is likely to be the result of individual desire to associate with those of similar racial background and economic status. In any event, such concentrations cannot in any way be traced to city government.

III. RACIALLY POLARIZED VOTING

Plaintiffs urge that although the Mexican American voters tend to vote for Mexican American candidates, they are unsuccessful in electing any. They point out that only three candidates with Mexican surnames have been elected to the City

Council since 1911. However, this is undoubtedly due to the very low Mexican American participation in the electoral process. Although they constitute 48.7% of the City's population, the highest percentage of registrations they were able to obtain insofar as the record before us reveals was in the year 1972 when 28.7% were registered to vote. Rather than attributing this low voter registration to political apathy, plaintiffs blame it upon the fact that the electoral process is in English and is therefore somewhat confusing to the Mexican American population. The fact remains that although the electoral process is open to Mexican Americans to the same extent that it is open to others, the failure of this group to elect one of their own members to office can be attributed largely to their own lack of participation in it.

IV. DISCRIMINATORY CAMPAIGN TACTICS

Plaintiffs relate that in two major elections where Mexican Americans have conducted a highly publicized campaign, newspapers and incumbents have appealed to the racial fears of the Anglo community. The article quoted in plaintiffs' Memorandum of Points and Authorities as proof of this contention does not support such an allegation. It contains no reference to race, either express or implied, and it clearly challenges the candidate as

an individual who participated in a recall endeavor which the editorial writer characterized as an attempt to "wreck the protection of civil service."

Plaintiffs further complain that the campaign efforts of the Mexican American candidates were seriously undermined by the city clerk's office which, prior to the election, issued charges of alleged voter registration irregularities. If such irregulatities existed, the City Clerk had the right, as well as the duty, to announce them. There is no indication in the record here that the charges were unfounded nor that they were directed to the Mexican American community.

In that campaign the mayor took an active part, apparently branding the Mexican American candidates as "activists." The only racial implication which the plaintiffs find is that the mayor was probably referring to the La Raza Unida Party and their program to register Mexican Americans in the barrio. Even if plaintiffs' assumptions are true, this organization is politically activistic and an attack upon it is no more evidence of racial polarity than an attack upon the John Birch Society.

Plaintiffs allege in a general way that some incidences of police harassment at the poles and activities on the part of some election officials discouraged Mexican Americans from voting. These

allegations are vague, indefinite and conclusionary. But even if some such occasions did occur, although unfortunate, there is no showing that these were more than a few isolated incidents which fall short of establishing a pattern from which inference of voter polarizaition may be drawn.

V. THE CITY'S RESPONSIVENESS

As further proof of the plaintiffs' contention that the voting scheme as implemented tends to dilute the voting strength of the class whom they represent, they urge that although the problems of the barrio are such that only residents of the barrio can understand them, neither the mayor nor members of the City Council have in the past ten years resided in the barrio tract. Furthermore, only a relatively few persons who make up various committees and commissions live in the barrio. Also, plaintiffs point to the City's employment record as indicative of the City's nonresponsiveness. This indicates that Mexican Americans are employed primarily in the nonprofessional categories and are found to be located in the low scale salary ranges.

If, as plaintiffs contend, the barrio is populated predominantly by people in the low income and poverty level, where there is high unemployment and low levels of education with relatively low civic

awareness as indicated by the percentage of registered voters in that area, one would not expect to find therein many people with the leisure time, the interest, not the financial support which would enable them to run for public office or would permit them to participate in civil affairs to the extent that their selection on commissions and committees would be likely. Furthermore, with the low level of education which plaintiffs describe, it is not surprising that the members of the barrio find employment predominantly in nonprofessional categories with the attendant lower scale salary ranges.

Plaintiffs point specifically to their lack of representation on the City Redevelopment Agency and suggest that as a result the agency attempted to demolish some of the buildings in the barrio and to build a multi-unit building which was opposed by the residents because they feared they would lose their homes. It is quite obvious that the City, through the Redevelopment Agency, was attempting to remove some of the blight of which the plaintiffs complain and that the residents objected for fear they would lose their substandard housing which plaintiffs would have us believe was being forced upon them. It is not at all clear just what position the plaintiffs would have a representative,

completely responsive to the wishes of the residents of the barrio, take with respect to the City's Redevelopment Program. Would they want the barrio cleaned up or not?

These facts even if true do not support the inference that the city government is less responsive to the Mexican American citizens than to any other segment of the community.

VI. CITY POLICY INADEQUATE TO SUPPORT LARGE ELECTIONS

The plaintiffs have suggested that the reasons given by the City for maintaining the at-large election scheme is inadequate and is in fact an insult to the Mexican American community. The reason for such election scheme was set forth in a letter to State Assemblyman James Keysor as follows:

> "However, in some cities the use of districts would not only artificially limit qualified people from serving on city councils but would make it difficult for some cities to recruit candidates in every district which is necessary for meaningful choice by the voters."

San Fernando is a relatively small, compact city covering an area of approximately two square

miles and having a population of approximately 17,000 persons. The reason given by the City under the circumstances, therefore, appears to be reasonable and certainly not arbitrary or capricious.

VII. CONCLUSION

It is axiomatic that whenever a claim is made that a city government is being administered in such a manner as to invidiously dilute the voting power of a racial minority within its boundaries, it is the duty of the courts, with a zealous desire to protect the rights of such minorities, to carefully examine the evidence in order to recognize and prohibit such practices as are found to be constitutionally impermissible no matter how subtly they may appear.

But the task also requires a perceptiveness which will enable the court to distinguish between repressive political phenomena rooted in racial considerations and that which is a natural consequence of the exercise by the majority of its legitimate power as such in a democratic society.

Plaintiffs' facts appear to fall in the latter category. The City plan is such as to allow all persons irrespective of race to participate in the governing process on an equal basis according to their wishes and their ability. The failure of persons in the class which plaintiffs represent

to participate in city government has been due to apathy, lack of education, training and experience, lack of economical support, and other similar reasons which are applicable to all persons irrespective of race but who are otherwise similarly situated. Plaintiffs have simply failed to allege any facts to support their contention that the City's governmental plan as implemented has brought about any dilution of the voting power of its Mexican American citizens as a class. They are therefore not entitled to succeed in these proceedings.

It is true, of course, that the plaintiffs seek further discovery. In fact, the discovery which plaintiffs propose is so vast and extensive that if allowed it would impose an almost impossible burden upon the City. But, plaintiffs have been unable to give this court any assurance that the results would be other than cumulative or that they would be more pertinent than the facts thus far set forth in the record.

I find, therefore, assuming *arguendo*, that all the facts alleged by the plaintiffs are true, they do not support plaintiffs' conclusions which form the basis of their claims. I further find that there is no substantial issue of fact which remains to be litigated, and that defendants are entitled to a judgment as a matter of law. Defendants'

motion for summary judgment will therefore be granted.

DATED: July 14, 1976

JESSE W. CURTIS
United States District Judge

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSE ARANDA, RALPH ARRIOLA, HECTOR BARRAGAN, RUTH ESTRADA, JESS MARGARITO, SYLVESTER MORENO, BARBARA PARRA, and LOUIS VARGAS, Plaintiffs, v. J.B. VAN SICKLE, PHILLIP JOHNSON, PAUL MACY, QUENTIN JOHNSON, PERRY HARRIS, and HELEN RAMSEY, Defendants.	FILED JUN 9 1977 NO. CV 74-551-JWC FINDINGS OF FACT AND CONCULSIONS OF LAW

The Motion of Defendants for Summary Judgment came on for argument on May 17, 1976 in courtroom 10 of the above entitled Court, the Honorable Jessie W. Curtis, Judge presiding.

John A. Lewis and Bill Thompson, attorneys, of Lewis, Varni & Ghiradelli, counsel, appears as

attorneys for Defendants and Joaquin G. Avila of the Mexican American Legal Defense and Educational Fund, counsel, appeared for Plaintiffs. Plaintiffs' filed a Memorandum of Points and Authorities in opposition to Defendants' Motion for Summary Judgment. The matter was argued by counsel and submitted. Whereupon the Court on July 16, 1976 rendered its Memorandum of Opinion, finding and concluding as follows:

FINDINGS OF FACT

1. The City of San Fernando is not, nor has it been at any time in the recent past, racially polarized.

2. Mexican Americans can live anywhere in the city they choose to live.

3. The concentration of Mexican Americans in the "barrio", cannot in any way be traced to city government but is the result of individual desire of the Mexican Americans to associate with those with similar racial and economic status.

4. The undesirable conditions in the barrio, such as old housing, unemployment, poverty, low levels of education, assumming they do exist, are social problems which, to a greater or lesser extent, face all communities and are problems which arise because local governments have not always been able to successfully accommodate the economically

and educationally disadvantaged who constitute a portion of their citizenry and in San Fernando there is nothing in the record to indicate that race plays any role in the matter; the underprivileged, by they white, brown or black suffer the same unhappy fate.

5. Although Mexican Americans constitute 48.7% of the city's population the highest percentage of registered voters they were able to obtain was 28.7% in 1972.

6. The failure of Mexican American voters to elect Mexican American candidates to the council in proportion to their population in the city is attributable, largely, to apathy of the Mexican American voters and not to racially polarized voting.

7. The electoral process is open to Mexican Americans to the same extent it is open to others.

8. There have been no racist campaign tactics against Mexican Americans either in the newspapers or by incumbents or anywhere else.

9. The charges of voter registration irregularities by the city clerk in the elction of 1972 was not directed to the Mexican American community and were made in the performance of her dutues as city clerk.

10. The reference to the Mexican American

candidates as activists in the elections of 1972 was probably a reference to La Raza Unida Party and its efforts to register Mexican Americans in the barrio and an attack upon this politically activist organizations is no more evidence of racial polarity than an attack upon the John Birch Society.

11. There is no evidence of police harassment at the poles; if such incidents did occur, they were no more than a few isolated incidents which fall short of establishing a pattern from which an inference of voter polarization may be drawn.

12. The concentration of Mexican Americans in nonprofessional categories with the accompanying lower salaries in the city government is attributable to low levels of education and low civic awareness and not to any racial discrimination.

13. The small number of councilmen and commission members from the barrio is due to low civic awareness which is the result of high unemployment and low levels of education and not the result of racial discrimination.

14. In response to the needs of the Mexican American community, the city through the Redevelopment Agency was attempting to remove some of the blight in the barrio of which Plaintiffs complain.

15. The city government is not less responsive to Mexican American citizens than to other

segments of the community.

16. The reason for maintaining the at large election scheme set forth by the City Administrator, Robert James, in a letter to Assemblyman James Kaiser, to the effect that it would make it difficult for small cities to recruit candidates in every district which is necessary for a meaningful choice by the voters, is reasonable and not arbitrary or capricious as San Fernando is a relatively small, compact city covering an area of approximately 17,000 persons.

17. The at large election scheme in the City of San Fernando is such as to allow all persons irrespective of race to participate in the governing process on an equal basis according to their wishes and their ability.

18. The failure of Mexican American registered voters to participate in the city government and to elect members to the council in proportion to their population has been due to apathy, lack of education, training and experience, lack of economic support and other similar reasons which are applicable to all persons irrespective of their race but who are otherwise similarly situated.

CONCLUSIONS OF LAW

(1) Plaintiffs have failed to prove any facts to support their contention that the city's at large

election scheme has brought about any dilution of the voting opwer of its Mexican American citizens or that it operates to invidiously discriminate against Mexican Americans.

(2) If all the facts alleged by plaintiffs are true, they do not support plaintiffs' conclusions that the at large election scheme as utilized in the City of San Fernando invidiously discriminates against Mexican Americans.

The Court concludes therefore, that there is no substantial issue of fact which remains to be litigated and the Defendants are entitled to a Judgment as a matter of law. Defendants' Motion for Summary Judgment is therefore granted and the clerk is ordered to enter Judgment therefore.

JESSE W. CURTIS
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT.

* * *

ENTERED UNITED STATES DISTRICT COURT
JUN 10 1977 CENTRAL DISTRICT OF CALIFORNIA

JOSE ARANDA, RALPH ARRIOLA, HECTOR BARRAGAN, RUTH ESTRADA, JESS MARGARITO, SYLVESTER MORENO, BARBARA PARRA, and LOUIS VARGAS,
Plaintiffs,

No. CV 74-551 JWC

JUDGMENT

v.

J.V. VAN SICKLE, PHILLIP JOHNSON, PAUL MACY, QUENTIN JOHNSON, PERRY HARRIS, and HELEN RAMSEY,
Defendants.

A motion by Defendants above named for Summary Judgment having been brought and the Court having made an order pursuant thereto granting the Defendants' motion and directing that Judgment be entered herein in Defendants' favor dismissing this action, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment is in all respects granted; the action is dismissed; and all former orders, rulings, opinions made herein remain in full force and effect.

DATED: June 9, 1977.

CLERK OF THE UNITED STATES
DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ARANDA, et al.,
Plaintiffs-Appellants,

v.

J.B. VAN SICKLE, et al.,
Defendants-Appellees.

FILED
JUL 12 1979

No. 77-2714

OPINION

Appeal from the United States District Court
for the Central District of California.

Before: BARNES and KENNEDY, Circuit Judges, and
VOORHEES, District Judge.*

BARNES, Senior Circuit Judge:

This is an appeal from the granting of a motion for summary judgment made by the defendants, who were once members of the city council, and the Mayor, of the City of San Fernando, California.

The district court found that the plaintiffs, members of the San Fernando Mexican-American community, who brought this class action under 42 U.S.C. §1983, had failed to establish that the at-large

*Honorable Donald S. Voorhees, District Judge, Western District of Washington, sitting by designation.

election scheme used by the City of San Fernando to elect its city council was unconstitutional under the Fourteenth, Fifteenth, Nineteenth, and Twenty-sixth Amendments to the United States Constitution.

I. FACTS[1]

The City of San Fernando, which has a population of 16,500, was incorporated in 1911 under California Government Code Section 34102. It has used an at-large election scheme under California Government Code Section 36503 or its predecessors in selecting its members of the five-person city council since that time. Council members are elected for terms of four years. The mayor is selected from among the council members.

Since 1911 only three Mexican-Americans have been elected to the city council despite the fact that Mexican-Americans comprise approximately fifty percent of the population. Because of this, plaintiffs, all members of the Mexican-American community and some of whom ran for the city council and lost, bring this class action alleging that they have been denied equal protection.

Plaintiffs contend that San Fernando is racially polarized. In support of this proposition they present certain historical data: old newspaper articles with racist overtones, and deeds which

contain racially restrictive covenants until these covenants were declared unconstitutional by the Supreme Court in 1948 in *Shelley v. Kramer*, 334 U.S. 1 (1948).

The city is divided into geographically separate communities. Census tract 3202 which is known as the barrio contains 37% of the total city population. However, the tract contains 80.1% of the population with Spanish surnames. The tract has a higher density, more children per woman, fewer high school graduates, higher unemployment, more low income families and families below poverty level, than the rest of the city. In short, the barrio is a geographically district community which is organized along racial lines.

Although Mexican Americans comprise 48.9% of the population (1970 census), they comprised only 28.7% of the registered voters in 1972. Voting appears to follow racial lines, that is members of the white community vote for white candidates while members of the Mexican-American community vote for Mexican-American candidates. Neither members of the city council nor the mayor have lived in the barrio for the ten years prior to the institution of this suit.

During the 1972 elections certain members of the Mexican American community were subjected to

harassment by the police. Specifically, certain Mexican American poll watchers were followed by the police to different places and questioned intensively despite the fact that the poll watchers had a right to be at the polls and were operating with the knowledge of the city clerk. In addition, private homes of which citizens are often used as polling places: in 1972, 5 out of 15 polling places were located in public buildings; in 1970, 7 out of 13 polling places were located in public buildings; and in 1964, 3 out of 27 polling places were located in public buildings. The private homes which were used were invariably non Spanish-surnamed households. The percentage of Spanish-surnamed persons participating in the mechanics of operating the election was also low. In 1976 only 6% of the inspectors and 13% of the judges had Spanish surnames.

Mexican-Americans were also sparsely represented on 18 city commissions. None of the city commissions had 50% Mexican-American membership. Over the 10 years prior to the institution of this suit, 6 of the city commissions had no Spanish-surnamed appointees and the Planning Commission had only 3 members who were barrio residents during those ten years. The following commissions had from 6% to 18% Spanish-surnamed membership:

Citizens Committee on Redevelopment, Community Cultural Development, Lopez House, Personnel Board, Planning Commission and Steering Committee--Recreation Park Issue. The city employed 35 Spanish-surnamed persons in 1974 in contrast to 92 whites and the vast majority of the Spanish-surnamed persons were the lower paid employees.

Plaintiffs also allege that the city is not responsive to the needs of the Mexican-American community. As specific examples the Newville-Meyer General Plan which would have expanded a street in the barrio and, so the residents felt damaged the "residential integrity" of the barrio; a high-rise apartment complex proposed by the city which would have forced low income Mexican-Americans from the city, and the failure of the city to place a stoplight at a street intersection located in the barrio despite the fact that many accidents had occurred at the intersection.

Plaintiffs also state that discriminatory campaign tactics were used in elections in which there were strong Mexican-American candidates. In support of this they quote from a 1954 editorial which appeared in the San Fernando Sun. They allege the article which attacked Jose Aranda, a Mexican-American's candidacy, was racially oriented. The article stated:

> "For the record . . . on June 8, 1951, JOSE ARANDA (together with Lee Ward, Sam Richardson, Gilbert Dotson, Robert Martinez and John Anderson) signed the official 'notice of intention to racall' 'Herb' Martin . . . one of the finest city councilmen we have ever had.
>
> "For the record . . . JOSE ARANDA was the president of the so called 'Civil Betterment League' which backed Smith, Schofield and Padilla . . . which tried to wreck the protection of civil service . . . which published the 'Bulletin.'"

In 1972, Jess Margarito, Richard Corona, and Alfred Bernal were the Mexican-American candidates for the city council. At that time an extensive voter registration drive was initiated by the Mexican-American community. As a result of this drive, 28.7% of all voters were Spanish surnamed. Just prior to the election, the city clerk issued statements concerning alleged voter registration irregularities. The incumbent mayor then issued a press release in which he stated:

> "Obviously our city election offers an enticing target to any outside organized group who needs a base of operations for their form of political activism. I believe it to be part of a Statewide trend whereby

> activists are attempting to wrest control of as many city governments in California as they possibly can from those they brand as "Establishment." They seek to gain entry into our houses of government that they may throw wide the doors to their followers who are waiting at the gates to join in the disruption of our orderly governmental processes. Their goal is chaos in government.

Plaintiffs allege that the statement concerning outside political agitators was an obvious reference to the La Raza Unida Party, a Mexican-American organization, which had conducted the voter registration drive. Whether the statements were designed to spread racist fears or not, the largest number of people turned out to vote in a city election in San Fernando history.

The City of San Fernando in a letter to its California assemblyman has justified its preference for at-large elections in this manner:

> "District elections in some cities are desirable and exist in these cities where residents have *voted* to use them. However, in some cities, the use of districts would not only artifically limit qualified people from serving on city councils, but would make it difficult for some cities to recruit candidates in every district which is necessary for meaningful choice by the voters.

Plaintiffs contend that this statement is tantamount to saying that the statement must be taken to express doubt that qualified Mexican-American candidates from the barrio will present themselves and take issue with the statement.

II. ISSUES

1. Does the "at large" election method used by the City of San Fernando in electing members of the city council violate plaintiffs', Mexican-American voters', right to equal protection and right to vote under the Fourteenth, Fifteenth, Nineteenth and Twenty-sixth Amendments of the United States Constitution?

2. Did the district court err in its determination that there was no genuine issue of material fact present in this case and that viewing the evidence in the light most favorable to the plaintiffs, summary judgment in favor of the defendants should be granted as a matter of law?

Inasmuch as this is an appeal from the granting of a motion for summary judgment, we turn to the record to ascertain if the proceedings below complied with Rule 56 of the Rules of Civil Procedure. The court's Findings of Fact and Conclusions of Law

appear at pages 1245-1249, Vol. V (or IV A) of the Record on Appeal, and appear in the attached Appendix A. The district court judge found there was no material issue of fact remaining to be litigated.

Thereafter a Memorandum Opinion was filed by the district court judge. It appears at pages 1171 to 1180 in Vol. V (or IV A) Of the Record. The trial judge's opinion is likewise attached to this opinion, as Appendix B.

Because this is an appeal from a complaint charging invidious discrimination against a *municipal* government, we find ourselves in a legal area (once described as a "mathematical quagmire"), with no precise guidelines from the Supreme Court. *See Wise, Mayor v. Lipscomb*, __U.S.__, 98 Sup. Ct. 2493 (1978).[2]

III. CONCLUSION

We are satisfied that the summary judgment granted by the District Court was properly granted, inasmuch as the plaintiffs failed to raise a genuine issue of material fact indicating that they have been denied access to political process (*i.e.*, to register, to vote, to be candidates for public office, to campaign for office, to participate in the selecting of candidates, or to hold office), or that the San Fernando elections for City Council

"were conceived or operated as purposeful devices to further racial or economic discrimination." *Whitcomb v. Chavis*, 403 U.S. 124, at 149 (1971). The defendants were hence entitled to summary judgment as a matter of law.

To paraphrase the Supreme Court in *Whitcomb*,

> "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents has less opportunity than did other [City of San Fernando] residents to participate in the processes and to elect [councilmen] of their choice." (*Id.* at 149).

Again to paraphrase the words of Mr. Justice White in *Whitcomb v. Chavis, supra*:

> "The mere fact that one interest group or another concerned with the outcome of . . . elections has found itself outvoted and without . . . seats of its own provides no basis for involving constitutional remedies, where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.* at 154-155).

Here we have in the record no protracted history of racial discrimination affecting or touching

a minority's ability to participate in the electoral process (such as segregated schools, tests to qualify voters, or refusal to register Mexican-Americans) which are the background of many cases arising out of the Fifth Circuit. *See Zimmer v. McKeithen,* 485 F.2d 1297 (1973) where it was held a "panoply of factors" may be introduced to prove the fact of dilution, which is established "upon proof of the existence of an aggregate of these factors," *Id.* at 1305).

The defendants question the weight of any discernible aggregation of factors. They assert, for example, that the small size of the city--both in area--(2.1 sq. mi.) and in population (16,571 at the time of trial) militate against multi-district elections. We agree with appellants there is no *per se* rule against multi-district elections because of physical size or size of population. But obviously, there comes a time when the rule of *de minimis* should be considered and this factor of size or the lack of it, is one of the factors which is to be considered when determining the weight of the aggregate.

Graves v. Barnes, 343 F. Supp. 702 (1972), a 3-judge case, was reviewed by the Supreme Court *sub nomine White v. Regester,* 412 U.S. 755 (1972). The Supreme Court found no invidious discrimination in

violation of the Equal Protection Clause of the Fourteenth Amendment *solely* because there was a 9.9% variation between the number of voters in the largest and smallest district (412 U.S. 755, 761-764); but that in Dallas and Bexas Counties there existed *more* than a mere variation between districts.[3] As to the two counties last named the essential proof to comply with plaintiff's burden of proof did exist--namely, that members of the swing group had "less opportunity than did other residents of the district to participate in the political processes and to elect legislators of their choice," pointing out that in the opinion in the District Court it had listed previous race discrmination in Texas.[4]

The Supreme Court then stated:

> " . . . These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them." (*Id.* at 767)

As the *Graves v. Barnes, supra,* per curiam opinion states (following the principle of *Kramer v. Union Free School District,* 395 U.S. 626 at 626):

> " . . . [W]hen a minority group is invidiously disadvantaged by

> the concomitance of poverty, past and continuing discrimination, a restrictive electoral system, and a peculiar districting scheme, which gives it 'less opportunity' to participate successfully, the Court will void such an apportionment scheme." (*Id.* at 732)

There seems little doubt that the plaintiffs herein represent a group which suffers poverty, but there is remarkably little, and no substantial, proof in the record of past discrimination, no substantial proof of continuing discrimination, and no proof whatsoever of any restrictive electoral system, or any peculiar districting scheme, which gives the group represented by plaintiffs "less opportunity" than other residents of San Fernando to participate successfully in the entire and complete electoral process in electing their municipal officers. In this case before us, the findings and conclusions made by the trier of fact are directly contrary to the findings and conclusions quoted by the Supreme Court in *White v. Regester, supra.* Just as in the latter case, "we have no reason to disturb them" (*Id.* at 767), and,

> "On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely

> local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." (*Id.* at 769-770)

We adopt the opinion of the district court judge, attached hereto as Appendix "B", and *Affirm* his action granting summary judgment to the defendants.

FOOTNOTE 1:

We adopt as facts those which, fairly read, are most supportive of appellants' position.

FOOTNOTE 2:

Apparently no Supreme Court case has ever explicitly held that an at-large system for election of members of a city's council is unconstitutional.

> "[W]e have never had occasion to consider whether an analogue of this highly amorphous theory (of *White v. Regester*, 412 U.S. 755, 765 (1973) may be applied to municipal governments. . . .
>
> "[W]e need not today consider whether relevant constitutional distinctions may be drawn in this area between a state legislature and a

municipal government."
98 Sup. Ct. at 2505. Concurring opinion, Rehnquist, J.

FOOTNOTE 3:

"The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice, *Whitcomb v. Chavis, supra,* at 149-50." (*White v. Regester, supra,* at 766).

FOOTNOTE 4:

" . . . , [T]he District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F. Supp.

at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought. More fundamentally, it found that since Reconstruction days, there have only been two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated

organization that is in effective control of Democratic Party slating in Dallas County. That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon 'racial campaign tactics in which precincts to defeat candidates who had the overwhelming support of the black community," *Id.*, at 727. Based on the evidence before it, the District Court concluded that 'the black community has been effectively excluded from participation in the Democratic primary selection process,' *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner." (*White v. Regester*,

supra, at 766-767).

Re: Jose Aranda, et al., v. J.B. Van Sickle, et al., No. 77-2714
KENNEDY, Circuit Judge, concurring:

After some hesitation, I too conclude that summary judgment was proper in this case, and I concur in the judgment of the court and in the approach adopted by Judge Barnes. Certain conclusions of the trial court do remain troublesome, however, and further comment on these matters seems appropriate.

The standards for determining the constitutionality of systems for electing state legislators set forth in cases such as *White v. Regester*, 412 U.S. 755 (1973) and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), have not yet been applied by the Court to systems for electing city council members or mayors. This was noted in the concurring opinion of four Justices in *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978), but it was not there suggested how municipal elections differ in relevant respects from cases involving state legislatures. Perhaps in two cases different weights might be assigned to the analytic elements examined to determine whether or

not the election system is unconstitutional, *cf. United States v. Uvalde Consolidated Independent School District*, 461 F. Supp. 117, 122 (W.D. Tex. 1978); 87 Harv. L. Rev. 1851, 1857 (1974), but where a system for electing government representatives is created or maintained for the purpose of discriminating against a minority group, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229 (1976), it must be held unconstitutional whether municipal or state elections are involved. As the Fifth Circuit has done, *see Marshall v. Edwards*, 582 F.2d 927, 930 n. 4 (5th Cir. 1978), and cases cited therein, it is appropriate to apply the principles of *White*, *Whitcomb*, and other relevant precedents to suits challenging municipal at-large election methods.

The plaintiffs originally brought this suit alleging violation of both the fourteenth and fifteenth amendments, but on appeal they do not argue in the briefs that fifteenth amendment standards differ from fourteenth amendment standards. *See Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3247 (Sept. 22, 1978) (No. 78-492). Moreover, I assume *arguendo* that under either or both the fourteenth amendment or fifteenth amendments the court could grant equitable relief to restructure an at-large system where necessary to correct deliberate government acts designed to deprive ethnic minorities of political participation or political benefits, even without a finding that the system itself was maintained with that intent. Nevertheless, that remedy would not be justified in this case, since restructuring the election system is so fully disproportionate to any discriminatory act that might be established after hearing all of the plaintiffs' evidence here.

The precise wrong the plaintiffs appear to assert in the case is that the city council refused to submit to the electors an ordinance providing for the election of members of the legislative body by or from districts, as is permitted under Cal. Gov. Code § 34871. Based on the evidence adduced by these plaintiffs, I do not think a reasonable finder of fact could conclude, *see Tyler v. Vickery*, 517 F.2d 1089, 1094 (5th Cir. 1975), that the at-large electoral system of San Fernando was operated or maintained for the purpose or with the intent of discriminating against ethnic minorities.

The forbidden intent, normally considered a finding of fact, *but see United States v. City of Chicago*, 549 F.2d 415, 425 (7th Cir. 1977), may be inferred either by direct evidence bearing on the passage or maintenance of the at-large system, or,

as is more usually the case, from evidence bearing on other aspects of the political system. Thus, under *White* and *Whitcomb* improper intent may be inferred from evidence demonstrating that "the political processes leading to nomination and election were not equally open to participation by the group in question--that is, if members had less opportunity to participate in the political processes and to elect legislators of their choice." 412 U.S. at 755-56.

In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) the Fifth Circuit developed a framework for district courts considering whether a minority group has been denied equal access to the political process as part of a claim that an at-large plan was maintained with a discriminatory *purpose*.

> The court in *Zimmer* established two categories, one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the underlying dilution. The "primary" factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the "particularized interests" of the group, the

> weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The "enhancing" factors include: the size of the district; the portion of the vote necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must move; and whether condidates must reside in subdistricts.

Nevett v. Sides, supra, 571 F.2d at 217 (footnote omitted). Which I would not necessarily adopt the *Zimmer* test as the law of this circuit, it is a useful way to approach whether a minority group has been denied access to the political process.

The Supreme Court's analysis of challenges to various methods for electing representatives has produced another principle important for resolution of this case. The Court has stated unequivocally that minority groups have no constitutional right to proportional representation in a legislative body. Failure to elect a minority candidate, whether the government entity maintains an at-large election scheme or some other method, does not by itself violate the Constitution. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 166-67 (1977); *id.* at 179-80 (Steward & Powell, JJ, concurring in

the judgment); *Whitcomb v. Chavis,* 403 U.S. at 148-60. A showing that minority group candidates consistently lose at the polls may be a prerequisite to a claim, supported by other evidence, that the voting scheme is maintained with discriminatory intent. *See Nevett, supra* at 223. If, however, the only evidence offered by a plaintiff challenging an at-large voting system is the outcome of elections, summary judgment is appropriate. No reasonable person could infer from only these election results that the at-large method was maintained because of discriminatory intent.

The facts on which plaintiffs base their claim are detailed at greater length in the majority and district court opinions. They include: Mexican-Americans in 1970 constituted 48.9% of the city's population; the highest percentage of Mexican-American registered voters wa- 28.7% of all registered voters in 1972; since 1911 three Mexican Americans have been elected and one appointed to the city council; some Mexican-American poll watchers were harassed during the 1972 elections; half to nearly all the polling places in recent elections have been located in homes of families, none of which are Spanish surnamed;[1] a lower percentage of Mexican-Americans are appointed as participants in the mechanics of operating the elec-

tions than exists in the general population; a lower percentage of Mexican-Americans have been appointed to city commissions, at least since 1964, than exists in the general population; two construction proposals were considered, one for expansion of a street, and one for the building of an apartment complex, and relevant portions were deleted as a result of sentiment expressed by members of the barrio community; the city failed to place a stoplight at a street intersection in the barrio; prior to 1948 racially restricted covenants existed in real estate deeds; a particular newspaper editorial was printed in 1954; passages from a few newspaper articles from the early 1900's allegedly contained disparaging works about Mexican-Americans; at the time of a Mexican-American voter registration drive the city clerk in 1972 issued statements concerning alleged voter registration irregularities; and the mayor issued a subsequent statement concerning the efforts of "activists" to take over the city government. Finally, it was undisputed by the parties that the municipality of San Fernando has a population of about 16,500, that its area is approximately two square miles, and that Mexican-American candidates have appeared on the ballot and campaigned for council positions in recent elections.

Assuming that plaintiffs' factual allegations

are true, when taken together, they would not permit a reasonable person to infer that the at-large system for electing the mayor and city council members is maintained because of an invidious intent. Viewed through the *Zimmer* framework, it is apparent that only a very small number of the facts alleged are probative of discriminatory maintenance of the at-large plan or denial of opportunity to participate in the political processes.

Political parties do not take an active part in city council elections. It is thus not necessary for a potential candidate to secure approval through party primaries or slating processes in order to appear on the ballot. *Compare White v. Regester*, 412 U.S. at 766-67. Further, Mexican-American candidates have appeared on the ballot and campaigned for council positions in recent elections, and a Mexican-American candidate was almost elected to the council in 1974 and was later appointed to the city council. In addition, there is no claim that the city council set barriers to voting registration. Finally, I note that several of plaintiffs' allegations of defects in the electoral process resulting from the use of English only in registration and voting procedures appear to be remedied by the Voting Rights Act of 1975, 42 U.S.C. § 1973aa-1a(a), and Cal. Elections Code § 1635 (1975), and

there is no allegation that defendants have not complied with these statutes. This fact is highly probative regarding equal access to the political process. *Cf. Hendrix v. Joseph*, 559 F.2d 1265, 1268 (5th Cir. 1977).

Also relevant to determining access to the political process is plaintiffs' evidence regarding the location of many polling places in private white homes outside the barrio. *See* note 2, *supra*. The district court made no explicit finding as to the reasons why so few polling places were located in the barrio or in a Mexican-American surnamed home. I believe plaintiffs' evidence in this respect might be sufficient in other contexts to survive a summary judgment motion, but assuming plaintiffs' charge of discriminatory placement is true, the facts still cannot reasonably be viewed as indicating denail of access to the political processes which in turn would justify either an inference that the at-large system was maintained because of discriminatory intent or a finding that restructuring the system is the appropriate remedy to cure the violation. There is no substantial evidence in the record indicating that location of polling places has made it systematically more difficult for Mexican-Americans to vote, causing Mexican-Americans who otherwise would have voted to forego voting. More important, place-

ment of polling places is only one component of determining accessibility to the political processes.

The facts advanced by plaintiffs similarly cannot reasonably be viewed as suggesting that San Fernando's municipal government is unresponsive to the particular interests of the Mexican-American community. Plaintiffs refer to a proposed redevelopment project which was opposed by several barrio residents. The project was substantially altered in response to comments by members of the Mexican-American community, which suggests just the opposite conculsion from what plaintiffs seek to prove.

Plaintiffs' other evidence regarding unresponsiveness is more substantial. Mexican-American representation on various city commissions is, in general, substantially lower than the percentage of Mexican-American residents or registered voters. The district court found: "The small number of councilmen and commission members from the barrio is due to low civic awareness which is the result of high unemployment and low levels of education and not the result of racial discrimination." It is not clear that service on the various commissions requires a high level of education or that the small number of Mexican-American councilmen results from the lack

of available qualified Mexican-Americans. The district court's finding may, after further examination, turn out to be not clearly erroneous, but it was not proper on summary judgment to conclude this result was not the produce of deliberate bias. Even assuming invidious discrimination in city commission appointments, however, it does not follow that the present election system must be restructured.

Plaintiffs also present city employment data showing that Mexican-Americans are employed primarily in the nonprofessional and lower salary categories. The district court did not improperly choose between competing reasonable inferences in concluding that professional positions require higher levels of education than nonprofessional positions. Given the undisputed facts that as of 1970 10% of barrio residents had no education, 20.8% had a high school education, and 2.0% had a college education, the employment statistics are insufficient in this context to support a reasonable inference that the city's hiring policies reflect unresponsiveness to the Mexican-American community.

Hendrix v. Joseph is relevant both to commission appointments and employment data. In that case the Fifth Circuit reviewed a district court

holding that the at-large system for electing the county commission of Montgomery County, Alabama, was unconstitutional. The facts were roughly similar to those in the instant case; indeed, plaintiffs' case was stronger in many respects in *Hendrix* than here. In its discussion of the commission's responsiveness to minority interests, the court noted that the commission had *already* been found guilty of discriminatory hiring practices and was under court order to end those practices. *See id.* at 1269. Noting that "the hiring disparity here is indicative of some measure of lack of responsiveness since the prerequisites to a hiring discrimination lawsuit include a showing of intentional refusal to hire otherwise qualified persons by the defendant Commission," the court still concluded: "This finding alone, however, is not enough . . . Hiring disparity is relevant at all only because it is suggestive of the fact that the Commission believes it can treat black citizens unequally with impunity. Such a belief, of course, is in turn a symptom of dilution . . . The allocation of jobs is only one piece of the puzzle." *Id.* The court eventually held that, as a matter of law, the facts found by the district court were insufficient to support a finding of unconstitutionality, and remanded for further proceedings. As discussed

below, plaintiffs' evidence may be sufficient in other contexts to justify some relief. I agree with the court in *Hendrix* that this type of evidence cannot as a matter of law support a finding that the at-large plan is unconstitutional.

The remaining factors of the *Zimmer* test favor the defendants. The state's policy supporting at-large plans is long standing. Indeed, it was only in 1955 that California passed a statute permitting cities the option of holding single-member district elections. *See* Cal. Gov. Code § 34871. Further, the continued validity of the state and local interests supporting at-large plans is illustrated by recent hearings conducted by the state legislature over various proposals to restructure local election plans. *See, e.g.*, Hearings Before the Assembly Committee on Elections and Reapportionment, Whether City Councilmen Should Be Elected by District; Whether Local Elections Should Become Partisan, October 10, 1975 (conducted at San Fernando City Hall). As to the effect of past discrimination on plaintiffs' ability to participate in the election system, the relevant facts are the existence of racially restrictive covenants in property deeds, not outlawed until *Shelly v. Kraemer*, 334 U.S. 1 (1948), newspaper articles from the early 1900's and one from the mid-1950's which, construed

favorably to plaintiffs, show general anti-Mexican-American sentiment in the community, and apparently a lower rate of voter registration among Mexican-Americans than whites. Plaintiffs did not present to this court the percentage of voter registration among eligible Mexican-Americans, but I infer from plaintiffs' other statistics it is lower than that of whites. San Fernando does not have the history of pervasive official discrimination which is discussed in several Fifth Circuit voting dilution cases. And, white it appears that the residential patterns of the city are at least in part the product of past discriminatory covenants, the relation of this fact either to voter registration data or other indicia of inability to participate in the political process is remote at best. As the court in *Hendrix* stated: "The factual question is whether that discrimination precludes effective participation in the electoral system by blacks today in such a way that it can be remedied by a change in electoral systems." 559 F.2d at 1270. On the facts presented, the answer to that question must be no.

Of the "enhancing factors" listed in *Zimmer*, three out of four favor the defendants. San Fernando is smaller than most populations where at-large plans have been found unconstitutional. *But see Kendrick v. Walder*, 527 F.2d 44 (7th Cir. 1975)

(population of 6227). A majority of the votes is not necessary to be elected; the candidates with the most votes are elected to the available positions. A voter in San Fernando need not cast all of his or her allotted votes. The factor which favors plaintiffs is that there is no requirement that candidates reside in any particular geographical district.

"In cases such as these, all factors must be considered, and those which imply a nondiluted system cannot be ignored," *Hendrix, supra* at 1270. The standards described in relevant Supreme Court cases do require balancing several elements, and such balancing is normally the province of the finder of fact. Still, there comes a point where the paucity of factors supporting a plaintiff, and the abundance of those supporting the defendant, require that summary judgment be granted. That point has been reached here. Although the case favoring summary judgment is not overwhelming, the facts plaintiffs allege could not reasonably support strong enough inferences on enough aspects of intentional denial of access to the political process to justify striking down the at-large plan. *See Hendrix v. Joseph, supra. Cf. Black Voters v. McDonough*, 565 F.2d 1 (1st Cir. 1977); *McGill v. Gadsen County Commission*, 535 F.2d 277 (5th Cir.

1976). To conclude that the plaintiffs' evidence could not justify striking down the at-large system does not, in my view, necessarily mean that plaintiffs may not be entitled to some relief. For example, plaintiffs' statistics regarding placement of polling places in private homes, few of which are Spanish-surnamed or located in the barrio, might be sufficient to withstand a summary judglent motion in a lawsuit seeking to have some of the city's polling places located in the Mexican-American community. Similarly, although a minority group does not have a constitutional right to proportional appointments on municipal commissions, the plaintiffs' showing in this case regarding Mexican-American representation of city commissions might, after further examination, justify a remedial requirement of increased consideration and/or appointment of Mexican-Americans to such bodies. These factors are mentioned solely to define the limits of our decision and not to suggest the outcome if such a case were presented.

What distinguishes the present case from the possible challenged mentioned above is the weakness of the inference of intent and the more extreme nature of the remedy sought here. Federal courts have required single-member districting plans to be prepared and implemented where plaintiffs have

demonstrated the appropriateness of such a remedy. Conceivably, reasonable people presented with plaintiffs' evidence in this case might make a finding of intentional discrimination in some aspects of the city's political processes. That evidence is not, however, sufficient to permit invalidation of the at-large electoral mechanism.

For the foregoing reasons, I concur in the judgment of the court.

ANTHONY M. KENNEDY
United States Circuit Judge

FOOTNOTES

[1]The plaintiffs' brief summarizes the facts:

> For the 1972 election, only 5 out of the 15 polling places were located in public buildings; the remaining polling places were non-Spanish surname households. For the 1964 election, only 5 of the 27 polling places were Spanish-surname households. Our of the 27 polling places for the 1964 election, only 3 were public buildings. In the 1970 elections, out of the 13 polling places, only seven were public buildings, and there were no Spanish-surname households.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE ARANDA, et al.,
Appellants,
v.
J.V. VAN SICKLE, et al.,
Appellees.

FILED
SEP 17 1979

No. 77-2714

ORDER

Before: BARNES and KENNEDY, Circuit Judges, and VOORHEES, District Judge*

The panel as constituted in the above case (Judges Barnes, Kennedy and Voorhees) has voted unanimously to deny the petition for rehearing.

Judge Kennedy votes to reject the suggestion for rehearing *en banc*, and Judges Barnes and Voorhees recommend that it be rejected.

The full Court has been advised of the suggestion for an *en banc* hearing, and no judge of the Court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing *en banc* is rejected.

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*Honorable Donald S. Voorhees, District Judge, Western District of Washington, sitting by designation.